

## **EXHIBIT 3**



U.S. Department of Justice

Environment and Natural Resources Division

90-8-6-05900

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March 29, 2005

*By electronic and regular mail:*

Patti A. Goldman  
Earthjustice Legal Defense Fund  
705 2nd Ave, Suite 203  
Seattle, WA 98104-1711

Re: Administrative Record in *Washington Toxics Coalition v. United States Department of Interior*, No. 04-CV-1998 (W.D. Wa.).

Dear Patti:

This letter responds to your letter of March 22, 2005 concerning the scope of the administrative record submitted in the referenced matter by the United States Fish and Wildlife Service and the National Marine Fisheries Service (together, the "Services"). As an initial matter, I note that the administrative record, which you describe as "lean," includes more than 100 documents relied on by the Services in this rulemaking, and more than 50 sets of substantive comments by interested parties, including all of the Plaintiffs in this case, as well as more than 200 examples of form and other non-substantive comments submitted to the Services, and approximately 40,000 comments submitted by electronic mail. Weighing in at over 5,000 pages, this record is not "lean." And, more importantly, it is the proper basis for judicial review in this matter.

In your letter, you identify many kinds of documents that you believe should be included in the administrative record.<sup>1/</sup> The documents that you have identified fall into several broad categories. Except as noted below, none of these documents are properly included in the record. First, you seek documents that record internal agency deliberations (what you refer to as "internal agency give-and-take"), such as e-mails between Service staff, meeting minutes, notes, and drafts. The Services' counterpart regulations, however, are to be reviewed on their stated

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<sup>1/</sup>The description included in your letter of the telephone conversation that we had on January 14, 2005 regarding the administrative record is not entirely accurate. You claim, for example, that I "confirmed" that several categories of documents would be excluded from the record, but the categories that you identify do not correspond precisely to the categories that I discussed. It is unnecessary to identify these discrepancies further at this time, however, because the administrative record has now been filed (and thus speaks for itself) and because the issue is not relevant to the current dispute between the parties.

basis and the record evidence. *See, e.g., San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 751 F.2d 1287, 1325 (D.C. Cir. 1984) (“The principle that judges review administrative action on the basis of the agency’s stated rationale and findings . . . is well-established.”) (emphasis in original). Internal agency deliberations and any documents recording them are irrelevant to the Court’s inquiry here and are not properly part of the record. *Id.* at 1324 (denying motion to supplement record with transcripts of agency meetings and stating that courts “do not ordinarily study predecisional transcripts of deliberations within an agency.”). As such, these documents were properly excluded from the administrative record.<sup>2/</sup>

Second, you believe that documents held by the United States Environmental Protection Agency (“EPA”), the United States Department of Agriculture (“USDA”), the Council on Environmental Quality (“CEQ”), and the United States Department of Justice (“DOJ”) should be included in the administrative record. The counterpart regulations were issued by the Services, however, and it is black-letter administrative law that the administrative record should consist of materials “considered by agency decision-makers . . . .” *Thompson v. United States Department of Labor*, 885 F.2d 551, 555 (9<sup>th</sup> Cir. 1989). By extension, any documents that are held by the other agencies that you have identified but which were not considered by the Services cannot properly be included in the administrative record. (And to the extent that any such documents would also record internal agency deliberations, their inclusion would be doubly inappropriate for the reasons discussed above.)

Third, you have identified several kinds of documents that relate generally to EPA’s pesticide program and the Endangered Species Act, including, for example, documents related to previous consultations between EPA and the Services on pesticide issues. An administrative record, however, is a record of a particular agency action, not a comprehensive history of all agency documents on a subject. Here, the Services have submitted the administrative record for the agency action that has been challenged, specifically, the Services’ counterpart regulations. It is not appropriate to include documents in the record that were not considered by the Services simply because they address the same broad issues or because they might properly be included in the record of a different agency action.

Your letter also identifies some documents that do not fall within these broad categories, but which were nonetheless omitted from the record. As explained below, we agree that some of these documents should be included in the record. You note that public comments received after the publication of the advanced notice of proposed rulemaking (but before the publication of the proposed rule) were not in the administrative record. This omission was inadvertent and we intend to add these comments to the record. For your information, copies of these comments are also available on the Internet at <http://docket.epa.gov/edkpub/index.jsp> under Docket No.

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<sup>2/</sup>As you note in your letter, we did not submit a privilege log with this record. In general, privileged documents, including documents subject to the attorney-client and deliberative process privileges, record internal agency deliberations that, for the reasons discussed here, are not properly included in the administrative record at all.

OPP-2003-0010.

You also note that, while the record includes EPA's "Overview of the Ecological Risk Assessment Process," it includes only 80 of the 81 identified "supporting documents" and none of the 26 "references" cited in that "Overview Document." In fact, there are only 80 supporting documents to EPA's Overview Document (all of which are already included in the record). Any references to 81 supporting documents and specifically to supporting document no. 6 are typographic errors. (It was determined late in the drafting process that the materials originally identified as supporting document no. 6 were already included in another of the supporting document citations and EPA chose not to renumber the supporting documents.) We agree that the 26 "reference" documents cited in the Overview Document are properly included in the administrative record and will provide copies of any such documents that are not otherwise available to the public.

In your letter, you also imply that this record may have been compiled in "bad faith" and state that it has been "sanitized" and only includes "documents supporting the agencies' position." We reject any implication that this record is "sanitized," that there has been any act of "bad faith," or that documents have been intentionally omitted from this record because they do not support the Services' counterpart regulations. Rather, the parties appear to have a dispute about the proper scope of the record and, for the reasons discussed above, the document you allude to are not properly part of the administrative record. I also note that the record includes literally thousands of pages of materials submitted by Plaintiffs during the public comment period. Since Plaintiffs opposed the promulgation of these regulations, and presumably submitted whatever documents they believed supported that opposition, the record cannot fairly be said to include only "documents supporting the agencies' position."

For all these reasons, and with the exceptions noted above, the Services maintain that the administrative record that we have submitted is the correct administrative record and the proper basis for judicial review in this case. Except as stated, we do not believe that it is appropriate to supplement the record with the kinds of documents that you have identified in your letter. Please let me know how you would like to proceed to resolve this dispute. In addition, please contact us if you identify any other specific documents that you believe have been omitted from the record. I can be reached at 202-305-0216.

Sincerely,

/s/ James A. Maysonett

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James A. Maysonett, Trial Attorney  
Wildlife and Marine Resources Section  
Environment and Natural Resources Division  
United States Department of Justice

cc: J. Michael Klise

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